

Before the
Federal Communications Commission
Washington, DC 20554

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| In the Matter of |) | |
| |) | |
| Petition of AT&T Inc. For Forbearance |) | |
| Under 47 U.S.C. § 160(c) From Enforcement |) | |
| Of Certain of the Commission's Cost |) | |
| Assignment Rules |) | WC Docket No. 07-21 |
| |) | |
| Petition of BellSouth Telecommunications, |) | |
| Inc. For Forbearance Under 47 C.F.R. § 160(c) |) | |
| From Enforcement of Certain of the |) | |
| Commission's Cost Assignment Rules |) | |

REPLY COMMENTS OF SPRINT NEXTEL CORPORATION

Sprint Nextel Corporation ("Sprint Nextel") hereby files its Reply Comments to the Petitions for Forbearance from enforcement of the Federal Communication Commission's ("Commission") cost assignment rules (together the "Petition") filed by AT&T Inc. and BellSouth Telecommunications, Inc. (together "AT&T") in the above-referenced proceeding.¹

I. All Commenters, except USTA, Oppose AT&T's Petition.

All parties filing comments, except USTA, vehemently oppose AT&T's Petition. The opposing parties include a wide variety of stakeholders representing the interests of state governments, consumers, corporate users, and service providers. Specifically, the opposing parties include a state public utility commission, three state consumer protection organizations, state members of a federal-state joint board, an organization representing rural independent companies, an organization representing large corporate telecommunications users, and two

¹ The rules from which AT&T seeks forbearance collectively will be referred to herein as the "cost assignment rules." The information the cost assignment rules generate will be referred to herein as the "cost assignment information" or the "cost assignment data."

competitive telecommunications carriers. The only commenter that supported AT&T's Petition was the United States Telecom Association ("USTA"), an ILEC lobbying organization that represents AT&T. The strong, unified chorus of opposition from such a diverse mix of parties sends a strong message to the Commission that granting the Petition would adversely affect the public interest.

II. Price Cap Regulation Does Not Eliminate the Need for the Cost Assignment Rules.

USTA claims that price cap regulation negates the need for the cost assignment rules. Specifically, USTA contends that the cost assignment rules should not apply to AT&T since neither its interstate nor intrastate prices are based on cost assignment data.² Contrary to USTA's assertions, however, cost assignment data are absolutely necessary not only to ensure rates set under price cap regulation continually meet statutory requirements, but also to satisfy other core regulatory objectives.

A. Cost Assignment Data are Necessary to Keep Price Capped Rates Just, Reasonable and Nondiscriminatory.

The Commission has a statutory duty to ensure that rates are just, reasonable and not unjustly or unreasonably discriminatory under Sections 201(b) and 202(a) of the Communications Act, as amended (the "Act").³ Contrary to USTA's claims, the mere fact that a rate is established under a price cap plan does not automatically deem such rate just, reasonable and nondiscriminatory. For example, it is possible that outdated price cap indices may not produce rates satisfying this standard. Case in point is special access. Special access rates are subject to price caps or pricing flexibility, yet AT&T reaped a 91.7 percent special access rate of

² See USTA Comments at 5-6.

³ 47 U.S.C. §§ 201(b), 202 (a).

return in 2005.⁴ BellSouth realized a 98.4 percent special access rate of return that same year.⁵ In 2006, AT&T's special access rate of return continued to soar to a whopping 100 percent.⁶ Such excessive rates of return cannot possibly reflect just, reasonable and nondiscriminatory rates.

Clearly, price cap indices alone cannot guarantee rates that satisfy the Act. As the Ad Hoc Telecommunications Users Committee ("Ad Hoc") points out, "federal courts have consistently reviewed the earnings of regulated companies in addressing claims regarding the reasonableness of carrier rates."⁷ In the same way, the Commission also should examine earnings with cost assignment data to make its statutory assessment.

Moreover, the Commission's obligations to ensure that carriers meet the requirements in Sections 201(b) and 202(a) of the Act are continuing obligations. While USTA claims that over the past fifteen years the Commission "took the remaining actions needed to maximize the effectiveness of its price caps," the Commission cannot, in fact, set price caps indices or formulae and then forget about them in perpetuity.⁸ As Ad Hoc notes, "[w]hen regulatory authorities, including the Commission, prescribe price cap formulae, that is not the end of regulatory oversight."⁹ Given the market is not static, but constantly evolving, the Commission has a duty to "continue to evaluate the operation of the system and revise the formulae or indices

⁴ Ad Hoc Opposition at 4.

⁵ Special access rate of return information is based on data set forth in FCC Report 43-01, Table I Cost and Revenue, Column(s) Special Access, Row 1915 Net Revenue divided by Row 1910 Average Net Investment.

⁶ *Id.* Verizon's rate of return climbed from 42 percent in 2005 to 51 percent in 2006. *Id.*

⁷ Ad Hoc Opposition at 10-11 (*citing FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944); *American Telephone and Telegraph Co. v. FCC*, 836 F2d 1386, 1390 (D.C. Cir. 1988)).

⁸ USTA Comments at 7.

⁹ Ad Hoc Opposition at 13.

as necessary,” and regulators must adjust price cap mechanisms to ensure they remain effective.¹⁰

B. Cost Assignment Information is Critical For Other Essential Regulatory Purposes.

The cost assignment rules are needed not only to ensure that price cap mechanisms are effective, but also to perform a host of other essential state and federal regulatory functions. In particular, commenters note that the Petition raises issues that significantly impact state regulators and their obligation to determine whether AT&T’s charges and practices are just and reasonable and not unjustly or unreasonably discriminatory.¹¹ In fact, many of the commenters agree that the complex federal-state nature of the cost assignment rules demand a closer, more comprehensive review informed by a federal-state joint board, not a fractional review under a forbearance petition.¹²

The Public Service Commission of Wisconsin (“Wisconsin PSC”), for example, cites a laundry list of state applications for data generated under the cost assignment rules. Such applications include calculating state assessments, auditing affiliate transactions, reviewing and overseeing alternative regulatory regimes, reconstructing historical cost data to reflect a change

¹⁰ *Id.* Time Warner and Ad Hoc agree that the Commission and the states need cost assignment data to assess periodically whether rates are reasonable, just and nondiscriminatory and to reinitialize price capped rates when necessary to ensure such rates continue to comply with the just and reasonable standards of Sections 201(b) and 202(a) of the Communications Act. Time Warner Opposition at 5-8, 11; Ad Hoc Opposition at 9-12.

¹¹ *See e.g.*, Wisconsin PSC Comments at 2 (“It is not appropriate for the Commission alone to address these matters until the impacts on state jurisdiction accounting are examined thoroughly”); State Joint Board Members Comments at 4-13; Texas OPUC Comments at 2; Nebraska Companies Comments at 3-4; and Time Warner Opposition at 19.

¹² *See* Wisconsin PSC Comments at 1-2; Texas OPUC Comments at 2, State Joint Board Members Comments at 4-6, Time Warner Opposition at 20-22, New Jersey Rate Counsel Comments in WC Docket No. 05-342 at 18, and NASUCA Reply Comments in WC Docket NO. 05-342 at 2-4.

in regulation, and regulating subscriber line charges.¹³ The State Members of the Federal-State Joint Board on Separations (“State Joint Board Members”) add that some states use separations results and other cost assignment data to set local rates and establish local rate designs, to evaluate whether intrastate special access rates are just and reasonable, to set wholesale rates (such as intrastate toll access rates and reciprocal compensation rates), and to resolve interconnection arbitrations.¹⁴ Time Warner Telecom Inc. (“Time Warner”) also notes that states have rejected AT&T’s assertion that price cap regulation obviates the need for accounting rules because states need such regulation for other purposes, such as determining universal service funding levels and setting UNE rates.¹⁵

The cost assignment rules also produce crucial data to evaluate significant federal policy decisions. For example, the Commission needs cost assignment data for its pending examination of the special access pricing regime. Given that Regional Bell Operating Companies (“RBOCs”) are reaping extraordinary special access earnings, it is clear that the system is not working.¹⁶ Sprint Nextel agrees with Ad Hoc and Time Warner that without the cost assignment rules, the Commission would be unable to fulfill its statutory obligation to review the special access regulatory regime and ensure special access rates are just, reasonable and non-discriminatory.¹⁷ In addition, as Ad Hoc points out, the Commission also must consider the impact of AT&T’s proposal on the general reform of intercarrier compensation mechanisms.¹⁸ If the Commission

¹³ Wisconsin PSC Comments at 2-4.

¹⁴ State Joint Board Members Comments at 10-12.

¹⁵ Time Warner Opposition at 10.

¹⁶ See New Jersey Rate Counsel Comments in WC Docket No. 05-342 at 8-9 (“the prevailing special access rates are not those that would prevail in a competitive market place.”).

¹⁷ Ad Hoc Opposition at 2-5. See also Time Warner Opposition at 7.

¹⁸ Ad Hoc Opposition at 19.

grants AT&T's Petition, the Commission will lose access to key cost assignment data that are relevant in determining the impact of virtually all of the intercarrier compensation proposals.¹⁹

Finally, it is important to note that despite USTA's claims that cost assignment information is no longer applicable to AT&T, AT&T itself relies upon and often touts its cost assignment information as representative of its operations. Ad Hoc provides several examples in which AT&T (legacy SBC) has favored the Automated Reporting Management Information System ("ARMIS") reports when results suggest earning deficiencies, but has disfavored ARMIS reports when the converse is true.²⁰

III. The Cost Assignment Rules are Critical to Help Safeguard Consumer Interests.

USTA alleges that since cost assignment data are no longer used to set prices, the Commission no longer needs to apply the cost assignment rules to AT&T to safeguard consumer interests.²¹ USTA is incorrect. Price caps are no substitute for the cost assignment rules to protect consumers in markets lacking competition. The cost assignment rules work together with price cap mechanisms to produce competitive results that safeguard consumers from unlawful cross-subsidization and other anticompetitive conduct. As Time Warner cites the Commission, unlawful "cost-shifting can have adverse impacts on ratepayers, by improperly increasing the prices they pay for their use of regulated services"²² Moreover, the National Association of State Utility Consumer Advocates ("NASUCA"), affirms the importance of the cost assignment rules to consumer protection when it asserts that, "[p]rice cap regulation without proper cost assignment as the Commission's rules require is not adequate protection for

¹⁹ *Id.*; Time Warner Opposition at 7-8.

²⁰ Ad Hoc Opposition at note 10.

²¹ USTA at 8.

²² Time Warner Opposition at 14 (*citing Third Computer Inquiry*, Report and Order, 104 FCC 2d 958, 1074, para. 234 (1986), *subsequent history omitted*).

consumers when the ILECs remain dominant carriers”²³ Similarly, the Texas Office of Public Utility Counsel (“Texas OPUC”), a state organization that represents residential consumers and small commercial customers, notes that, “[u]nder price cap regulation the Commission and states should periodically assess if rates are reasonable, just and nondiscriminatory” and “such assessments would require cost information.”²⁴

IV. Denial of AT&T’s Petition Serves the Public Interest.

USTA claims that grant of AT&T’s Petition is in the public interest, when in fact denying the Petition will best serve the public interest. First, USTA reasons that price caps protect consumers. Price caps do not in fact protect consumers for the reasons discussed above.

Second, USTA alleges that, “[i]mposing additional and unnecessary conditions on one carrier while leaving its competitors unfettered from such burdens merely diminishes AT&T’s effectiveness in developing and delivering competitive offerings in real-time without any corresponding regulatory benefit to consumers.”²⁵ USTA implies that AT&T competes with other carriers on a level playing field, and the cost assignment rules somehow put AT&T at a competitive disadvantage.

The Texas OPUC, however, attests to the fact that many of AT&T’s residential markets remain regulated in Texas due to a lack of competition.²⁶ Sprint Nextel agrees with the Texas OPUC that ILECs are still dominant in many markets, so there is a critical need to protect consumers and ensure that they do not exploit their market power to the detriment of

²³ NASUCA Reply Comments in WC Docket No. 05-342 at 7. NASUCA adds that “[p]rice caps do not protect consumers in markets where there is a lack of competitive alternatives.” *Id.* at 8.

²⁴ Texas OPUC Comments at 2-3.

²⁵ USTA Comments at 8-9.

²⁶ Texas OPUC Comments at 3.

competition.²⁷ As Time Warner observes, the cost assignment rules are “designed to limit ILECs’ ability to act on their incentives to misallocate the costs of competitive, regulated services to cost categories associated with regulated services over which ILECs have market power.”²⁸ Contrary to USTA’s argument, the cost assignment rules actually help level the playing field by ensuring AT&T does not engage in unlawful cross-subsidization and other anticompetitive conduct.

Third, USTA maintains that, “[e]very segment of the telecommunications industry is experiencing robust inter- and intra-modal competition,” and such “competition in telecommunications markets can be relied upon to deliver the ultimate benefits – service at low prices – which consumers deserve.”²⁹ USTA, however, fails to recognize that the Commission can rely on competition only when the market is fully and effectively competitive. Without competition, the Commission cannot rely on market forces to keep prices low and provide other competitive benefits in the public interest.³⁰ The fact that AT&T may be subject to some competition for certain of its services does not justify forbearance. In any event, every segment of the telecommunications market is not competitive. For instance, as Ad Hoc attests, market forces are insufficient to control AT&T’s pricing of special access services, terminating switched access services, and originating access services.³¹

Even if there is competition in a certain segment of the telecommunications market, the cost assignment rules are still necessary. As Time Warner notes, “the Commission adopted these requirements notwithstanding the fact that the ILECs lacked market power or any significant

²⁷ *Id.* at 3.

²⁸ Time Warner Opposition at 15.

²⁹ USTA Comments at 9.

³⁰ *See* Ad Hoc Opposition at 16.

³¹ *Id.* at 16-19.

market share in the would-be subsidized service.”³² Time Warner offers the example of video dialtone service. In the case of video dialtone service, the FCC rejected ILEC arguments that there was no need for detailed accounting requirements because ILECs lacked market power in that market.³³ The Commission reasoned that “accounting requirements were necessary to ‘ensure that telephone ratepayers do not have to bear the costs of video dialtone’ and also to ‘protect cable operators from potential anticompetitive actions by LECs, stemming from LEC incentives and opportunities to price video dialtone service unreasonably low relative to the costs of providing such service.’”³⁴

V. Conclusion

For the reasons discussed above, Sprint Nextel Corporation urges the Commission to deny AT&T’s Petition for Forbearance.

Respectfully submitted,

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³² Time Warner Opposition at 15.

³³ *Id.*

³⁴ *Id.* at 15-16 (citing *Telephone Company – Cable Television Cross Ownership Rules Sections 63.54 – 63.58 and Amendments of Parts 32, 36, 61, 64, and 69 of the Commission’s Rules to Establish and Implement Regulatory Procedures for Video Dialtone Services*, Memorandum Opinion and Order on Reconsideration, 10 FCC Rcd 244, 247-48, para. 2 (1994)).

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Reply Comments of Sprint Nextel Corporation in WC Docket No. 07-21 were delivered by electronic mail on this 9th day of April 2007 to the parties listed below.

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